(3)

No. 09-417

SUPREME COURT, U.S.
FILED
DEC 3 - 2009

IN THE

Supreme Court of the United States

CAROL MANIGAULT, Individually and as Administratrix ad Prosequendum and General Administratrix of the Estate of Jelani Darren Manigault, Deceased, and CAROL MANIGAULT and ANDREW MANIGAULT, Individually and as Parents and Natural Guardian of Jelani Darren Manigault,

Petitioners,

v.

CHRISTOPHER KING, HARRY MARTINEZ, FRED WILLIAMS, JUDD PETRONE, TOWNSHIP OF PRINCETON, MERCER COUNTY, STATE OF NEW JERSEY, PRINCETON TOWNSHIP POLICE DEPARTMENT, PRINCETON TOWNSHIP, JOHN/JANE DOES 1-10; ABC CORP. 1-10 AND/OR XYZ ENTITIES 1-10,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT HARRY MARTINEZ

DOUGLAS SANCHEZ
Counsel of Record
JACQUELINE CURKO
CRUSER, MITCHELL
AND SANCHEZ LLC
One Paragon Drive
Suite 159
Montvale, NJ 07645
(201) 474-7100

Counsel for Respondent Harry Martinez

QUESTION PRESENTED

Did the Third Circuit err when it determined that given the particular circumstances presented to Harry Martinez on the date of the subject incident, which included an armed and dangerous suspect who was in the process of lunging at a fellow Officer, and viewing the facts in the light most favorable to the Petitioners, the use of deadly force was objectively reasonable and thus not violative of the Fourth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION	1
COUNTER-STATEMENT OF THE CASE	2
A. Factual Background	5
B. Proceedings Below	8
REASONS FOR DENYING THE PETITION	10
I. The Concurrent Findings Of Both The District Court And The Third Circuit Were Not Clearly Erroneous And, Therefore, Should Not Be Disturbed	10
II. The Criteria Of Supreme Court Rule 10 Are not Satisfied	11
III. Summary Judgment Was Proper As Officer Martinez' Actions Were Reasonable In Light Of The Attendant Circumstances	13
A. The Qualified Immunity Standard	13

Contents

		Page
ANALYSIS		15
i.	Officer Martinez' Conduct Did Not Violate Jelani Manigault's Constitutional Rights	15
a.	Jelani was not "stopped in his tracks" and posed a continuing threat	19
b.	It was impossible for the Officers to diagnose Jelani's mental health	21
c.	The fact that the Officers came within 21 feet of Jelani does not render their conduct unreasonable	23
d.	The fact that Officer Martinez' actions were objectively reasonable is not thrown into doubt by the fact that his deposition was not conducted	25
CONCLUSION		28

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Creighton,
483 U.S. 635 (1987) 4

Baumgartner v. United States,
322 U.S. 665 (1944) 10

Bodkin v. Edwards,
255 U.S. 221 (1921) 10

Carswell v. Homestead,
381 F.3d. 235 (3rd Cir. 2004) 19

Collins v. City of Harker Heights,
503 U.S. 115 (1992) 25

Davis v. Scherer,
468 U.S. 183 (1984) 25

Graham v. Connor,
490 U.S. 386 (1989) ..... *passim*

Groh v. Ramirez,
540 U.S. 551 (2004) 13

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 13

Karnes v. Skrutski,
62 F.3d 485 (3rd Cir. 1995) 14

Cited Authorities

Page

Lamont v. New Jersey,
2009 WL 483899 (D.N.J. 2009) 21

Mace v. City of Palestine,
333 F.3d 621 (5th Cir. 2003) 12, 27

Pearson v. Callahan,
588 U.S. __, 129 S.Ct. 808 (2009) 14, 15

Reese v. Anderson,
926 F.2d 494 (5th Cir. 1991) 12

Rhodes v. McDannel,
945 F.2d 117 (6th Cir. 1991) 12

Rodriguez v. City of Passaic,
730 F.Supp. 1314 (D.N.J.1990) 15, 16

Saucier v. Katz,
533 U.S. 194 (2001) 13, 14

Siegert v. Gilley,
500 U.S. 226 (1991) 4

Smith v. Freland.
954 F.2d 343 (6th Cir. 1992) 17

Tennessee v. Garner,
471 U.S. 1 (1985) 1, 4

Young v. City of Killeen,
775 F.2d 1349 (5th Cir. 1985) 12

Cited Authorities

Page

United States Constitution:

Fourth Amendment ..... i, 3, 4

Statute:

42 U.S.C. § 1983 ..... 1, 8, 25

Rules:

Rule 56(f) 26

Supreme Court Rule 10 ..... 11, 12

INTRODUCTION

The petition for certiorari does not raise any question that warrants review by this Court. The Third Circuit's decision does not conflict with the decision of any other court of appeals. Nor does it conflict with any decision of this Court. Moreover, the petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court. Rather, the petition is premised solely upon what Petitioners perceive as error in the weight given by the two lower courts to the clothing worn by Jelani Manigault on the night in question and the distance the Officers maintained from Jelani in their efforts to apprehend him.

In reviewing whether the District Court properly granted summary judgment in favor of Defendants, the Third Circuit paid careful attention to the facts of this case, correctly recognizing that the time period over which the events transpired was swift and exigent. The Defendant Officers were confronted in the middle of the night with a suspect who was armed with a deadly weapon, who did not respond to their repeated commands, had previously stabbed another individual just prior to the Officers' arrival, and who was in the process of lunging at another Officer with the apparent intent to inflict either grievous bodily harm and/or kill him. Measured against this factual backdrop, the Third Circuit's sound determination that the Officers' conduct was objectively reasonable does not warrant second thought.

Lacking any case law conflict or other viable argument for review, Petitioners misstate the impact of Jelani Manigault's clothing to support an implausible claim that the Third Circuit articulated a holding that threatens a "miscarriage of justice" based on an asserted error of factual findings. (Pet. at 6). In reality, the Third Circuit broke no new ground and, in fact, simply applied a "totality of the circumstances" test, reasoning that the Officers' use of deadly force was objectively reasonable given the precarious situation which they confronted. This holding was premised on the well-established principle handed down by this Court in *Tennessee v. Garner*, 471 U.S. 1 (1985), which emphasizes that "the use of deadly force in effecting an arrest is constitutional when the officer has probable cause to believe that the suspect poses a threat to the officer." *Id.* at 11-12, 105 S.Ct., at 1701-1702.

Because the decision of the Third Circuit Court of Appeals is correct and there is no mature conflict in the courts of appeals, this Court's review is not warranted. Thus, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

Carol and Andrew Manigault (hereinafter "Petitioners") appeal from an Order entered by the United States Court of Appeals for the Third Circuit affirming the District Court's grant of summary judgment in favor of Defendants in this action brought, *inter alia*, under 42 U.S.C. § 1983 ("Section 1983") for various alleged deprivations of Jelani Manigault's Constitutional rights. (Petitioner's Appendix A). More specifically, Petitioners allege that the shooting of Jelani

Manigault violated the Fourth Amendment's guarantee against unreasonable seizures insofar as it constituted a "seizure" of Jelani's person through the use of excessive force.

There is no genuine dispute in this case about the relevant historical facts, and the record evidence clearly establishes four central realities which the Petitioners do not deny or controvert. First, the Officers confronted Jelani Manigault in the middle of the night in an area cloaked in pitch darkness, where the only available light source came from the Officers' own flashlights. Second, Jelani was armed with a bloody knife which he had used to repeatedly stab Mr. Sword just moments prior to the Officers' arrival. Third, Jelani was completely unresponsive to the Officers' commands to drop his weapon. Finally, at the time that Jelani was shot, he was in the process of lunging at Officer King who was laying on the ground, knife still in hand, and the three shots which were fired to counter Jelani's armed attack upon Officer King were discharged in rapid succession, if not virtually simultaneously.

The Petition for Certiorari conveys the impression that the Third Circuit upheld a decision which neglected to take into consideration Jelani Manigault's purported "mental disturbance" and suggests, if a suggestion it is, that law enforcement officials should be forbidden from employing deadly force in an effort to protect themselves, as well as innocent bystanders, from the threat of serious bodily harm and/or imminent death at the hands of an armed assailant based on esoteric indicators of mental distress. That is a false impression. The petition omits key details about the nature of the

events that transpired outside of the Swords' residence, as well as the conduct of Jelani Manigault. The petition also misstates the issues raised below and preserved for review, as well as the findings of the Third Circuit's decision.

The Constitutional question presented herein is governed by the principles enunciated in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989). These cases establish that claims of excessive force are to be judged under the Fourth Amendment's "objective reasonableness" standard. *Graham*, 490 U.S. at 388. Specifically, in *Graham*, the Supreme Court held "that all claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigation stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395.

Furthermore, for liability to attach, the right alleged to have been violated "must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If the law is not established clearly when an official acts, he is entitled to qualified immunity because he "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

Guided by these fundamental principles, the lower courts correctly ruled that there was no Constitutional violation, as the totality of circumstances was such that Officer Martinez and his fellow Officers were confronted in the darkness with a suspect brandishing a bloody knife who was consciously disregarding the Officers' repeated pleas to stop and drop his weapon. The encounter was then brought swiftly to a head, becoming confrontational only because Jelani chose to make it so by first, stabbing William Sword, and later charging at Officer King with a knife. In response, Officers King and Martinez discharged a rapid sequence of three bullets within a two to three second window, at most, that ceased once Jelani fell to the ground.

These seconds are critical on appeal because Petitioners erroneously see them as unfolding only one way—in slow motion. Notwithstanding this interpretation, this is a prototypical case where the Officers, faced with an armed and dangerous suspect, were forced to make split-second judgments in the heat of the moment. Even if their assessment of the threat was mistaken, it was not unreasonable, as they were forced to assess the situation in the midst of rapidly evolving events in an environment of extreme tension. Therefore, the District Court's and the Third Circuit's conclusions that Officer Martinez is entitled to judgment as a matter of law must stand.

A. Factual Background:

On January 23, 2003, the Princeton Township Police Department received a 911 emergency call from a panicked Mrs. Martha Sullivan Sword, reporting that an intruder had entered her home. She further reported that her husband had been stabbed and that he and

her brother were engaged in a struggle to defend against the intruder. Prior thereto, Mrs. Sword was awoken by the sound of her dogs barking. As she was getting up, she heard the doorbell ringing. Mrs. Sword woke her husband, William Sword and informed him that someone was at the door. They went downstairs together to see who was at the door. Turning on the outside light, they observed Jelani Manigault standing outside the door. As Mr. Sword opened the door, asking if Jelani needed help, Jelani pushed past them and entered the home.

As he walked toward the kitchen, Jelani became very agitated and began to act erratically, proceeding to rummage through the kitchen drawers and grabbing an eight (8) inch knife. Without provocation, Jelani brutally attacked Mr. Sword, stabbing him fourteen (14) times in total and inflicting eight (8) major wounds. Screaming, Mrs. Sword ran upstairs to get her brother, Robert Sullivan.

Mr. Sullivan ran downstairs and began to struggle with Jelani in an attempt to aid Mr. Sword, who was covered in blood. Mr. Sullivan put his arm around Jelani's throat and lifted him back off his feet. When Mr. Sword was freed from Jelani, he grabbed a frying pan and hit Jelani on the head, temporarily knocking him out. When Jelani came to, he once again had the knife in his possession. Mr. Sword approached Jelani from behind and hit him on the head with the pan again.

Somehow Mr. Sullivan was able to usher Jelani outside. As it turned out, Mr. Sullivan had not locked the door properly and Jelani re-entered the kitchen with

the knife in his possession again. As Jelani began to cut himself, Mr. Sullivan began to scream at him to get out of the house as loud as he could. Subsequently, Jelani walked outside with the bloody knife still in his hand.

Police Officers Christopher King, Harry Martinez, Frederick Williams and Judd Petrone arrived at the scene in response the 911 call within minutes of each other. Upon their arrival, they received a second update via radio indicating that the male intruder had left the house and was coming down the driveway. The area surrounding the home was cloaked in darkness and, unbeknownst to the Officers, the lawn was unkempt, the terrain was uneven and the ground was spotted with protruding tree trunks.

When Sgt. Petrone first observed Jelani, he was approximately 30 feet away. Sgt. Petrone illuminated Jelani with his flashlight as it was totally pitch dark. He positioned himself to the left of Jelani who was covered in blood, holding a knife up at head level in his right hand. Officer Martinez was positioned on his right.

At this time, Officer King began to run across the yard toward Officers Petrone and Martinez. As he approached, he could hear the Officers repeatedly pleading for Jelani to drop the knife. Officer King took up position approximately 20 feet away from Jelani, equidistant from Officers Martinez and Petrone, but in between them. As Officer King was closing his distance from 30 feet to 20 feet, he could hear Officer Martinez repeating his commands. Jelani's hands were both raised above his head and he was pivoting, eventually coming to a stop facing Officer King.

They continued to plead with Jelani to drop his weapon to no avail. Suddenly and without warning, Jelani broke into a run toward Officer King. Right before Jelani began his charge toward Officer King, Officer King overheard him say "go ahead and kill me," or "you're going to have to kill me." Sgt. Petrone looked to get a shot at Jelani but was unable to because Officer Martinez was in the line of fire.

Officer King began to retreat backwards but tripped over a protruding tree stump, falling to the ground. As Jelani approached, Officer King shouted for him to "stop." Realizing that Jelani was not complying and fearing for his life, Officer King discharged his weapon once. Jelani then "made a turn almost like he wasn't phased or hit. He just made a turn toward another threat . . . Still standing with the knife up . . ."

Instantaneously, Officer Martinez fired two shots at Jelani who was now facing his direction. Officer King testified that he and Officer Martinez fired their weapons almost at the same time and that the time between the first and second shots was "well under a second . . . a second wouldn't even be close, it was almost the exact same time." As Officer Williams put it, "[a]s the first shot was fired, the shots that came after them happened so quickly."

B. Proceedings Below

By way of Amended Memorandum and Order dated August 13, 2008, the District Court, Honorable Anne E. Thompson, U.S.D.J., granted summary judgment as to all Defendants on the Section 1983 claim. (Petitioner's

Appendix B). The District Court found that the following material facts had been established: (1) the Officers responded to a 911 call that an intruder had stabbed someone inside the Sword's residence; (2) the Officers encountered Decedent in the front yard of the Sword's home; (3) it was dark and the only light came from the Officers' flashlights; (4) Decedent's clothes were blood-stained and he was holding a knife at the level of his head; (5) Decedent ignored the Officers' repeated commands; (6) Decedent abruptly began to charge towards Officer King who tripped over a tree stump; (7) Decedent continued to advance and Officer King fired his gun while Decedent was approximately 6 feet away, knife still in hand; (8) almost instantaneously, Officer Martinez fired two shots at Decedent. Viewing this evidence in the light most favorable to the Manigaults, drawing all justifiable inferences in their favor, and considering the controlling law, the District Court determined that the Officers' use of force was reasonable.

The United States Court of Appeals for the Third Circuit, Judges Sloviter, Ambro and Jordan, upheld the District Court's decision, reasoning that the Officers' use of deadly force was objectively reasonable given the circumstances presented to them at the time. Justice Ambro, writing for the panel, found that at the time Jelani was shot, he was covered in blood, armed with a deadly weapon, did not respond to commands and was in the process of lunging at an Officer who had fallen to the ground. Contrary to Petitioners' assertion, the Third Circuit did consider the facts that Jelani was not wearing a jacket or shoes and had slit wrists, and determined that these indicators did not render the Officers' actions

unconstitutional, given the darkness of the scene and the brief time period in which the events unfolded. On this score, the Third Circuit held that there were no genuine issues of material fact that existed over whether the Officers used deadly force in an objectively unreasonable manner.

The Manigaults now present this appeal, arguing there are genuine issues of material fact regarding the reasonableness of the use of deadly force in the aforementioned circumstances. However, the undisputed facts unequivocally establish the heightened immediacy of the threat the Officers faced. Given these facts, the District Court and the Third Circuit properly concluded that it was reasonable as a matter of law for Officer Martinez to use deadly force in light of the substantial risk created by Jelani Manigault's violent and uncooperative behavior.

REASONS FOR DENYING THE PETITION

I. The Concurrent Findings Of Both The District Court And The Third Circuit Were Not Clearly Erroneous And, Therefore, Should Not Be Disturbed

Much to their disdain, both lower courts below decided against the Petitioners. However, to accept writ would be an unjustified departure from the long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous. *Bodkin v. Edwards*, 255 U.S. 221 (1921); *see also Baumgartner v United States*, 322 U.S. 665 (1944). An examination of the evidence in this case

not only fails to disclose such clear error but, on the contrary, wholly supports the conclusions of the lower courts by a clear preponderance.

II. The Criteria Of Supreme Court Rule 10 Are not Satisfied

This Court has complete discretion to determine whether to grant a petition for certiorari, however, generally a party petitioning for a writ must be able to demonstrate that:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; [or]
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Supreme Court Rule 10.

In the instant matter, a fair reading of the petition reveals that none of the Rule 10 criteria have been met. While Petitioners characterize this situation as one involving a "miscarriage of justice," they wholly fail to demonstrate how the Third Circuit rendered a decision that is in clear disconnect with the decision of another circuit court on the same matter and based on the same facts presented here. Quite to the contrary, the Third Circuit's holding is directly on par with various decisions by other circuits which hold that an officer's conduct which makes the need for deadly force more likely does not constitutionally disable the officer from later using deadly force to defend himself. *See, e.g., Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985); *Rhodes v. McDannel*, 945 F.2d 117 (6th Cir. 1991); *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991); *Mace v. City of Palestine*, 333 F.3d 621 (5th Cir. 2003). These examples are a mere sampling of countless cases which all support the general principle that an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack.

The other Rule 10 criteria are also absent. The New Jersey Supreme Court did not decide an important federal question, let alone decide it in a way that conflicts with the rulings of the high court of any other state, or of any United States court of appeals. Additionally, there is no important question of federal law for this Court to settle. As such, the petition for certiorari should be denied.

III. Summary Judgment Was Proper As Officer Martinez' Actions Were Reasonable In Light Of The Attendant Circumstances

A. The Qualified Immunity Standard

This case implicates anew the question of whether and under what circumstances a Police Officer is afforded immunity while acting during the scope of employment. The resolution of this purely legal question turns on whether the conduct of which a plaintiff complains violated clearly established statutory or Constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Immunity attaches regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Groh v. Ramirez*, 540 U.S. 551, 567 (2004).

In *Saucier v Katz*, the Supreme Court mandated the familiar two-step sequence for resolving qualified immunity claims. 533 U.S. 194 (2001). Because the question of whether an officer is entitled to qualified immunity is distinct from whether he used unreasonable force to begin with, the Supreme Court in *Saucier* articulated a new framework for analyzing qualified immunity claims. First, a court must decide whether the facts that a plaintiff has established are sufficient to make out a violation of a Constitutional right. *Id.* at 201. If the plaintiff fails to make out a Constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to immunity.

If evidence of a Constitutional violation has been adduced, Courts evaluating a qualified immunity claim move to the second step of the analysis: to determine whether the Constitutional right was clearly established. *Id.* at 199. To be "clearly established" for purposes of qualified immunity, the contours of the right must be sufficiently clear such that a reasonable official would understand that what he is doing violates that right. *Karnes v. Skrutski*, 62 F.3d 485, 492 (3rd Cir. 1995). That is, in the factual scenario established, would a reasonable officer have understood that his actions were prohibited? If it would not have been clear to a reasonable officer *what the law required* under the facts alleged, he is entitled to qualified immunity. Officers who make reasonable mistakes as to what the law requires are entitled to qualified immunity. *Saucier*, 533 U.S. at 205.

Recently, the Supreme Court jettisoned this two-step approach in *Pearson v. Callahan*, 588 U.S. __, 129 S.Ct. 808 (2009). In *Pearson*, the unanimous Court held that the order of the analysis laid out in *Saucier* "should not be regarded as mandatory." *Id.* at 818. Instead, lower courts may use their discretion to skip to the second question and avoid the Constitutional decision altogether. By noting that in many instances a court need not reach whether a Constitutional violation is alleged to determine if qualified immunity is appropriate, the *Pearson* Court stated that the first prong "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Id.* Thus, courts are permitted to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.*

So guided, summary judgment may be upheld here without ever addressing the Constitutional question, by virtue of the fact that the alleged unlawfulness of Officer Martinez' conduct in light of the attendant circumstances was not readily apparent, and thus not violative of clearly established law. However, because the parties briefed and both the District Court and the Third Circuit decided the case at hand in pre-*Pearson* fashion, it makes sense to adhere to a sequential mode of analysis here. We therefore face two questions: (1) whether Officer Martinez' conduct violated Jelani's Constitutional rights, and if so, (2) whether those rights were clearly established at the time of the shooting[1].

ANALYSIS

i. Officer Martinez' Conduct Did Not Violate Jelani Manigault's Constitutional Rights

In *Graham v. Connor*, the Supreme Court outlined the standard governing the right to be free from excessive force. 490 U.S. 386 (1989). The test is an objective one, which scrutinizes the reasonableness of the challenged conduct. *Id.* at 395. This "reasonableness" inquiry takes into account ***only*** the facts and circumstances known to the government actor at the time of his or her action. *Rodriguez v. City of Passaic*, 730 F. Supp. 1314 (D.N.J. 1990). In other words, for a court to determine the

1. Because there was no Constitutional violation, we do not need to address the second prong of the qualified immunity analysis. Respondents do note, however, that a determination that the force used by Officer Martinez was excessive and thus violated Jelani's Constitutional rights would not end the qualified immunity inquiry.

reasonableness of an officer's action, it "must stand in *his* shoes and judge the reasonableness of his actions based upon the information he possessed and the judgment he exercised in responding to that situation." *Id.* Knowledge of facts and circumstances gained by the officer after the completion of the act is irrelevant to a determination of the reasonableness of that officer's judgment vis-à-vis the conduct at issue. *Id.*

Because police officers are often forced to make split-second judgments in "circumstances that are tense, uncertain, and rapidly evolving, the amount of force that is necessary in a particular situation, and the reasonableness of the officer's belief as to the appropriate level of force, should be judged from that on-scene perspective." *Graham*, 490 U.S. at 396-397. With these considerations in mind, the *Graham* Court fashioned a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. *Id.*

Chief Justice Rehnquist explained that the test of reasonableness in this context "requir[es] careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. Thus, pursuant to *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the Officers at the scene. We must never "allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that police officers

face every day." *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992).

On this score, it is prudent to understand the dangers and limitations imposed upon officers when confronting a suspect with a weapon. What constitutes reasonable action may seem quite different to someone like Officer Martinez, facing an armed assailant, than to someone analyzing the question at leisure. In a very real sense, a police officer on the scene must make an instantaneous call in close cases. The range of permissible action must accommodate marginal cases sufficiently that fear of potential civil liability does not induce paralysis of action. Measured against these standards, it is beyond question that Officer Martinez' actions were objectively reasonable.

Contrary to Petitioners' implication, it is undisputed that it took **no more than mere seconds** from the time Jelani charged Officer King to the time that all three shots were fired. Officer King recalled that he and Officer Martinez fired their weapons almost at the same time and that the time between the first and second shots was "well under a second." He further stated that "**[a] second wouldn't even be close, it was almost the exact same time.**" Likewise, both Officers Petrone and Williams stated that the three gunshots came within split seconds of each other. As Officer Williams put it, "[a]s the first shot was fired, the shots that came after them happened so quickly that I really- you know, there wasn't like a span of time between the first shot where I could get a mental picture of what was going on."

The Manigaults discount the celerity with which these events unfolded. However, the crux of the matter is that it appeared to all who had a view of Jelani at the relevant time that he was an out-of-control individual. The very real danger the Officers perceived was immediately intensified when Jelani lunged at Officer King with the knife in an apparent attempt to cause him physical harm. Because the use of firearms is so commonplace nowadays, the destructive potential of edged weapons is far from appreciated, resulting in the, "He's only got a knife" mentality. When an armed suspect charges, the entire scenario will transpire in an incredibly short period of time, as here, and the techniques used to counter the attack must be clean and decisive. A seemingly insignificant puncture wound can result in significant blood loss that anyone short of a surgical staff on site would be powerless to abate. Based on his years of training and expertise, upon observing Jelani charge toward Officer King and subsequently turn and face him still holding the knife in the air, Officer Martinez was left with no choice but to discharge his weapon.

At the same time, Officer Martinez had to concern himself not only with Jelani's level of threat, but with the background of his target, the "use-of-force" continuum, shot placement, communication with the suspect as well as the other Officers, and control of Jelani's advancement upon Officer King, who was down on the ground, scrambling in the darkness. Rejecting the "vision of hindsight" so condemned by the *Graham* Court, it is evident that any lapse in response by Officer Martinez may well have rendered the situation catastrophic.

Although the events which form the basis for this lawsuit are, indeed, tragic, we cannot fail to look past the fact of the shooting to the danger any reasonable person would have believed Jelani posed on that rugged, wooded landscape in the middle of the night. Certainly with the luxury of hindsight one can parse each discrete act within those mere seconds and analyze each as if under a microscope. However, one must not lose sight of the fact that Officer Martinez had no such luxury and was forced to act in the blink of an eye. In this regard, the District Court properly noted that it was "mindful that its 'recitation of events is a discussion in slow motion of an incident that took place in a matter of seconds.'" (citing *Carswell v Homestead*, 381 F.3d. 235, 240 (3rd Cir. 2004) (Appendix B). Keeping in mind that a threat that may seem inappreciable in retrospect may appear more substantial to an officer whose own life or safety is at stake, there is no doubt that the force used by Officer Martinez was objectively reasonable. However, Petitioners posit that the Officers' use of force was excessive notwithstanding this factual backdrop. Their argument comprises four separate parts. We address each in turn:

a. ***Jelani was not "stopped in his tracks" and posed a continuing threat***

The Court must reject the Petitioners unfounded allegations that the shooting was unreasonable since "Jelani did not pose a threat to anyone" after the first bullet fired by Officer King, as this assertion is squarely at odds with the sworn testimony of Officers King, Petrone and Williams. While Courts have, on occasion, recognized that an officer's use of deadly force, which

may initially be reasonable, may become unreasonable as the course of events unfolds, this is not one of those situations. That multiple shots were fired does not suggest the Officers shot excessively as much as it indicates that they sought to ensure the elimination of a deadly threat.

Officer Petrone testified that he could not tell where, if anywhere, the first shot struck Jelani and that, in fact, he **did not** observe Jelani double over or bend at the waist. Officer Petrone stated that Jelani "***made a turn almost like he wasn't phased or hit. He just made a turn toward another threat . . . Still standing with the knife up . . .***" In actuality, Jelani had merely turned in the direction of another Officer, to wit, Officer Martinez. To be sure, Officer Petrone was attempting to maneuver himself into a position where he too "could take a shot." Had Officer Martinez not been in Officer Petrone's line of fire, Officer Petrone would have discharged his weapon as well.

As there are no conflicting accounts of Jelani's whereabouts or his menacing acts, there are only witnesses, the ones closest to the action, who all saw Jelani charge toward Officer King with his knife in the air, there is no genuine issue as to whether the threat posed by Jelani had ceased at the time that all three shots were fired.

b. ***It was impossible for the Officers to diagnose Jelani's mental health***

Petitioners make much of the fact that Jelani was not wearing a jacket and/or shoes at the time of the encounter and that he had slit wrists, devoting a considerable portion of their petition urging that the Officers should have, somehow, diagnosed Jelani as a "mentally and emotionally disturbed man." To accept such a proposition would wholly remove this case from any semblance of rationality.

Without much belaboring the point, even if Jelani had cuts on his wrists, **none** of the Officers observed same at any point prior to the shooting. Likewise, the Officers did not observe that Jelani was without shoes, as they were, for obvious reasons, not focused on his feet in the pitch darkness. It was not until ***after the shooting*** that any Officer observed slits on Jelani's wrists or discerned whether Jelani was wearing shoes.

Even assuming, *arguendo*, that the Officers had made these observations, the decisive factor weighing against the Petitioners' argument is that the Officers, in responding to an emergency situation, are not making clinical determinations about an individual's mental well-being based solely on the fact that he may not be wearing a jacket and/or shoes. From the diagnostic standpoint alone, legitimate manifestations of mental illness are not likely to be in this form. Even if they were, same would not defeat the reasonableness of the Officers' actions in response to the lethal threat posed by Jelani. *See Lamont v. New Jersey*, 2009 WL 483899 (D.N.J. 2009) (where the fact that plaintiff was in sweatpants and

shoeless did not create an issue of material fact as to the defendant officers' decision to use deadly force).

Moreover, none of the Officers, save for Officer King, ever heard Jelani say anything along the lines of "kill me, kill me." Only Officer King testified that Jelani made a comment, which was either "go ahead and kill me," or "you're going to have to kill me." But at the moment that sentence ended is when Jelani charged, giving Officer King no time to even process these words. The Petitioners' allegations do not at all take into account that the Officers were in the dark, dense woods, relying on their flashlights for visibility, facing an armed and bloody Jelani who had stabbed an innocent homeowner just minutes prior thereto, and he refused to voluntarily surrender his weapon.

Notably, Dr. Weinapple, Jelani's psychiatrist, discharged him from Princeton Medical Center without any medication and without any diagnosis of mental illness. If a licensed medical practitioner, whose field of expertise is assessing mentally and emotionally disturbed individuals, did not find Jelani to be mentally disturbed, the notion that Jelani's purported mental disturbance should have been "obvious" to the Officers is illogical.

This is not a situation where the Officers failed to use any judgment and immediately fired without attempting to defuse the situation. Rather, the Officers testified that they **would have maintained their positions and attempted to reason with Jelani for an indefinite period of time had he not charged Officer King with a weapon**. Therefore, giving due regard to

the pressures faced by the Officers, it is unreasonable to suggest that they should have disregarded the obvious dangers presented.

c. *The fact that the Officers came within 21 feet of Jelani does not render their conduct unreasonable*

Another issue raised by the Petitioners which the Court must equally reject is that the Officers allegedly did something that was tactically incorrect in their approach that contributed to the need to use deadly force, namely, by coming within 21 feet of Jelani. The fallacy in this argument lies in the fact that the Petitioners have consistently gravely distorted what has come to be known as the "21-foot rule."

There is absolutely no "policy" that mandates that the Officers must maintain any specific distance from an armed suspect. The "21-foot rule" is a "reaction time" calculation fairly standard in law enforcement training, which states that, in the time it takes the average officer to recognize a threat, draw his sidearm and fire 2 rounds at center mass, an average subject charging at the officer with a knife or other cutting or stabbing weapon can cover a distance of 21 feet. There is no authority in any jurisdiction, however, for the proposition that coming within 21 feet of a suspect ipso facto creates a cause of action for a Constitutional violation.

This distance should only be referenced as a very loose guideline, naturally subject to limitations and exceptions. In reality, all street officers must, by the very nature of their assignment, close the distance to a

suspect in order to control the situation. Each situation confronted is going to be different with unforeseen variables. Officers need the latitude to evaluate the situation in their, as well as the public's, best safety interests. If there must be error, it is far better to err in the favor of one's survival when faced with a suspect with a knife that has the present ability and demonstrated intent to use it, than to ask an officer to hold fire in order to ascertain whether the suspect will, in fact, injure or murder the officer. The high numbers of officer mortalities in recent years illustrate the unreasonableness of such a notion. As noted by the *Graham* Court, the "public interest may be better served by action taken 'with independence and without fear of consequences." 490 U.S. at 819.

Moreover, when referring to distances, the Officers' actions are invariably going to be a reaction to the suspect's behavior. What the Petitioners fail to point out is that the Officers took up position around Jelani at approximately 20 feet. It was Jelani who closed the distance by charging at Officer King. Under these circumstances, it is hard to imagine what choice Officer Martinez and his fellow Officers had but to react as they did.

Even if the Court assumes that the Officers violated proper procedures by narrowing their perimeter, this alleged breach does not suffice to overcome qualified immunity, as the act that justified the shooting was Jelani charging at Officer King. As Jelani created the situation that ostensibly warranted the use of deadly force, there is no triable issue of material fact in this regard. Indeed, the Third Circuit thoroughly considered

Petitioners' claims vis-à-vis the distance within which the Officers came toward Jelani and reasoned that, even assuming there to have been an abandonment of protocol, this could not form the basis for a remedy under 42 U.S.C. § 1983 or deprive the Officers of qualified immunity. Relying on this Court's decisions in *Collins v City of Harker Heights*, 503 U.S. 115 (1992) (holding that §1983 does not provide a remedy if there is no violation of federal law) and *Davis v Scherer*, 468 U.S. 183 (1984) (noting that officials do not lose qualified immunity where they violate administrative directives), the Third Circuit appropriately determined that the Officers did not violate Jelani's Constitutional rights.

d. *The fact that Officer Martinez' actions were objectively reasonable is not thrown into doubt by the fact that his deposition was not conducted*

Lastly, Petitioners argue the deposition of Officer Martinez was not conducted, thus there remains a genuine issue of material fact which was not given due deference by the lower courts. The extent to which this argument lacks merit need not be addressed at length[2].

It is not enough to pose philosophic doubts regarding the conclusiveness of undisputed evidentiary

2. Officer Martinez was not produced for deposition due to medical reasons as determined by the Honorable John J. Hughes, U.S.M.J. An Order dated February 28, 2008 permitted a Rule 35 Independent Medical Examination (IME) if Petitioners sought to dispute the conclusions contained in the narrative medical report prepared by Officer Martinez' physician. No IME was ever conducted.

facts. Whatever impressions Petitioners hope to elicit through Officer Martinez' deposition testimony are inconsequential to the resolution of this matter. Petitioners argue as if there were a *mens rea* to be established in this case. However, because the relevant test in this case is whether Officer Martinez' use of force was ***objectively reasonable*** in light of the circumstances confronting him, the focus is on the viewpoint of a reasonable police officer in his position, and his intentions or subjective impressions are wholly irrelevant. Considering the already large record compiled, which includes Officer Martinez' voluntary statement, the absence of a *Rule* 56(f) affidavit, the irrelevance of the discovery request, and the conjectural nature of the Petitioners' contentions, the Third Circuit did not err in upholding the motion for summary judgment and deciding in Officer Martinez' favor.

This decision is consistent with binding high court precedent, which states:

> [T]he question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, **without regard to their underlying intent or motivation**. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Graham, *supra*, 490 U.S. at 397, 109 S.Ct. 1865. Illustrative of this point is the Fifth Circuit's decision in

Mace v Palestine, 333 F.3d 621 (5th Cir. 2003), in which the court held it was improper to consider the defendant Officer's subjective intent as evidence of whether a reasonable officer could have perceived a threat of danger to himself or others in the circumstances before him.

It is undisputed that Jelani was agitated and brandishing a knife. Jelani did not respond to commands to drop his knife. The record evidence is also uncontradicted that when he was shot, Jelani was raising his knife toward the officers. The record further shows that this event took place in the darkness and on rough terrain, which limited the Officers' ability to retreat or to keep Jelani from harming others in the area. Based on the foregoing, it was objectively reasonable for Officer Martinez to make the split-second determination that Jelani posed a threat of serious physical harm and that deadly force was necessary. Any purportedly disputed fact issues are, thus, immaterial because their resolution would not alter the ultimate conclusion.

CONCLUSION

While the loss of any life is regrettable and even heartbreaking, the core uncontested details of this case reveal an encounter where the use of deadly force was, as sad as the outcome might be, imperative and, thus, objectively reasonable. The law does not require a reasonable officer to await physical harm before taking self-protective action; by then, it is often too late to take safety precautions. The only objectively reasonable response in this situation was to use deadly force.

The Third Circuit correctly stated the applicable rules of law and its rationales and properly concluded that the Defendants' actions were objectively reasonable. The Circuit Court's unwillingness to find the existence of a material issue of fact based on nothing more than Jelani's clothing and Petitioner's inability to gauge Officer Martinez' subjective impressions cannot be described as a conflict with the decisions of any other circuit court or any other decision of this Court. The Third Circuit did not ignore, or otherwise fail to accord appropriate respect to, a controlling decision of this Court. Nor is this the situation where an intervening decision of this Court created a conflict with a previously issued court of appeals decision that was not yet final. The petition also fails to establish that this case presents an important question of federal law that has not yet, but should be, resolved by this Court. Petitioners' asserted error consists solely of purported erroneous factual findings. Such a plea is, in all events, antithetical to the principles of judicial restraint that guide this Court's exercise of certiorari jurisdiction. Even if a mere plea for error correction could justify granting certiorari, the petition fails because the Third Circuit's decision was plainly correct.

Finally, even if the question presented in the petition could be said to have some general significance, in the abstract (and it does not), as to how law enforcement officials should apprehend "mentally distraught" individuals, resolution of this question is adequately analyzed by the objective reasonableness standard set forth in *Graham* and its progeny. A suspect's mental condition is simply but one factor to be considered in the totality of circumstances test. This case involves nothing more than a straight-forward application of established legal principles. To be sure, the frequency with which the question presented here has arisen and been decided by this Court makes clear that this issue need not be addressed again. Accordingly, Officer Martinez was entitled to qualified immunity and the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS SANCHEZ
Counsel of Record
JACQUELINE CURKO
CRUSER, MITCHELL
AND SANCHEZ LLC
One Paragon Drive
Suite 159
Montvale, NJ 07645
(201) 474-7100

Counsel for Respondent
Harry Martinez